

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JACK MOORMAN AND CAROL MOORMAN

PLAINTIFF

VS.

CIVIL ACTION NO. 4:04CV206LN

TOWER MANAGEMENT COMPANY, ET AL.

DEFENDANTS

MEMORANDUM OPINION AND ORDER

This cause is before the court on the motion of defendants¹ Trust for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiffs Jack Moorman and Carol Moorman have responded in opposition to the motion and the court, having considered the memoranda of authorities, together with attachments, submitted by the parties, concludes that the motion should be denied.

Plaintiffs Jack Moorman and his wife, Carol Moorman, filed this suit to recover damages for injuries sustained when Mr. Moorman fell after tripping on a piece of broken concrete on the mobile home lot which the Moormans leased from defendants.² The

¹ Defendants are Tower Management Company; William G. Steele, Jr.; Boggs Steele Investments, LLC; Tower Communications, LLC; The Steele Family Trust; William G. Steele, Jr. and Barbara T. Steele, Co-Trustees of the Steele Family Trust; the Logan A. Boggs 1998 Family Trust; Logan A. Boggs, Jr., Trustee of the Logan A. Boggs 1998 Family Trust and the Mary Jane Kurlander

² It is undisputed that at various times during the Moormans' tenancy at Hill Country Estates, the property was owned by one or more of the named defendants and that at the time the Moormans leased the lot in question and at the time of Mr.

Moormans, asserting claims based on theories of negligence and breach of an implied warranty of habitability, allege that defendants breached their duty to provide plaintiffs with a reasonably safe premises and are liable for the damages caused by this breach.

Defendants have moved for summary judgment, contending that plaintiffs cannot prevail on their claims because as a matter of law, defendants had no duty with respect to the repair and maintenance of the subject mobile home lot. The question thus presented by defendants' motion is this: Did defendants have a duty to repair or remove the broken concrete? Defendants argue they did not, and that under the law and the clear terms of the plaintiffs' lease agreement, plaintiffs were responsible for all repairs on the premises. Plaintiffs, on the other hand, take the position that defendants' lease of the premises to plaintiffs carried with it an implied warranty of habitability, which defendants breached by failing to provide the premises to plaintiffs in a reasonably safe condition at the inception of the lease and failing thereafter to correct a known hazardous condition.

Moorman's fall, respectively, the property was managed by Tower Management Company and Tower Communities, LLC. Although the Tower defendants did not own the property, they did act as agents for the owners in managing the property.

The following facts appear undisputed, at least for purposes of the present motion: The Moormans leased Lot 137 in the Hill Country Estates mobile home park from the Johnson Family Trust on February 20, 2002. At the time of that initial lease, the concrete sidewalk in front of plaintiffs' trailer was "busted up." Plaintiffs were aware of this condition, and indeed, were told by a representative of the then-owner that the sidewalk would be repaired.

In March 2002, shortly after plaintiffs moved onto the property, the mobile home park was purchased by defendants. According to plaintiffs, Mr. Moorman discussed the condition of the sidewalk with a representative of defendants sometime during March or April, and was told that it would be repaired. On June 2, 2003, defendants had plaintiffs sign a new lease agreement "for the rental and occupancy of a site" in the mobile home park. This lease recited as follows:

It is . . . agreed that the LESSOR shall not be called upon to make any improvements or repairs whatsoever upon the said premises or any part thereof, but LESSEE agrees to keep the same in good order and condition at LESSEE'S own expense.³

³ In their depositions, the Moormans agreed that they signed a new lease agreement with defendants, and admitted their signatures appeared on a June 2, 2002 lease agreement offered as evidence by defendants, but neither was able to recall having read the agreement. Notwithstanding that they may have failed to read the agreement, however, plaintiffs are bound by its terms. See Ross v. Citifinancial, Inc., 344 F.3d 458, 464-66 (5th Cir. 2003) (holding that under Mississippi law, signatories to a contract are under an obligation to read the contract before signing it and

Plaintiffs also signed a separate document acknowledging receipt of a copy of the Park Policies. Among other things, the Park Policies provided that plaintiffs would

maintain their home and yard in a clean, neat, safe, and orderly condition including, but not limited to, properly caring for shrubbery, lawns, replacing or repairing damaged awnings, porches, steps, walkways, foundation coverings or bent awning supports.

Plaintiffs allege that despite the promise by defendants' representative that the sidewalk would be repaired, it was not, and thus, plaintiffs were forced to step over or walk around the chunks of broken concrete to get from their car to the door of the mobile home. Then, on April 10, 2003, as Mr. Moorman was attempting to step over the broken concrete to get to the mobile home, his toe caught on the concrete, causing him to fall, as a result of which he suffered severe, permanent and debilitating injuries.

Plaintiffs originally claimed, or so it seemed, that defendants were liable for their alleged negligence in failing to maintain the subject mobile home lot in a reasonably safe condition during the term of the lease. From a review of plaintiffs' response to defendants' summary judgment motion, it now appears their claim is grounded not so much on a continuing duty during the term of the lease to correct alleged hazardous

thus, "are bound as a matter of law by the knowledge of the contents of a contract in which they entered notwithstanding whether they actually read the policy") (citations omitted).

conditions on the property, but rather on the alleged breach of an implied warranty of habitability, which plaintiffs submit obligated defendants to provide them with a reasonably safe premises *at the inception of their leasehold*, i.e., when defendants took over ownership and management of the property in March 2002.

Prior to O'Cain v. Harvey Freeman and Sons, 603 So. 2d 824 (Miss. 1991), the Mississippi Supreme Court "unquestioningly applied *caveat emptor* to landlord-tenant relationships," although in implicit recognition of the harshness of the doctrine, the court had created exceptions to the doctrine. Id. at 832. There were exceptions for a landlord's failure to disclose known latent defects; for defects in parts of the premises subject to common use; for repairs undertaken by the landlord but negligently performed; and for a landlord's express covenant to repair. Id. n.2 (citations omitted). In O'Cain, however, based on the concurrence authored by Justice Sullivan and joined by a majority of the justices, the court abandoned *caveat emptor* and adopted an implied warranty of habitability for "residential leases." Justice Sullivan's concurrence advocated abandoning the common law rule of *caveat emptor* as applied to residential lease agreements, and applying, instead, a general implied warranty of habitability. He declared:

I can no longer endorse the application of *caveat emptor* to residential lease agreements. With regard to such leases, we should dispose of the outmoded, problematic and unduly burdensome doctrine of *caveat emptor* which treats a lease agreement as a conveyance of land. The better view is to recognize that landlords are not selling an interest in land, residential tenants do not intend to purchase an interest in land, residential leases are contracts, and landlords have more incentive and opportunity than tenants to inspect and maintain the condition of the premises.

Id. (citations omitted).

Justice Sullivan opined that this approach was in line with the then-recent legislative enactment of the Residential Landlord and Tenant Act, Miss. Code Ann. § 89-8-1 et. seq., which requires landlords to comply with requirements of "applicable building codes materially affecting health and safety" and to "[m]aintain the dwelling unit, its plumbing, heating and/or cooling system in substantially the same condition as at the inception of the lease." Id. However, he did not view the RLTA as sufficient, because building and housing codes which affect health and safety are often governed locally and therefore do not establish a broad, generally applicable standard. Accordingly, he wrote:

I advocate that the bare minimum standard for an implied warranty of habitability should require a landlord to provide reasonably safe premises at the inception of the lease, and to exercise reasonable care to repair dangerous defective conditions upon notice of their existence by the tenant, unless expressly waived by the tenant.

Id. at 833. See also Joiner v. Haley, 777 So. 2d 50, 51-52 (Miss. Ct. App. 2000) (implied warranty of habitability towards landlords

adopted through Justice Sullivan's concurrence in O'Cain); Sweatt v. Murphy, 733 So. 2d 207, 210 Miss. 1999) (confirming court's adoption of implied warranty of habitability for residential leases). It is now well recognized in this state that a landlord's breach of the implied warranty of habitability entitles the tenant to pursue both contract and tort remedies. See O'Cain, 603 So. 2d at 833 ("There is no reason why a landlord should not . . . be subject to tort liability when he has failed to use reasonable care to provide safe premises and this failure has caused the tenant personal injuries.").

Defendants argue that while Mississippi law recognizes an implied warranty of habitability with regard to residential leases, i.e., leases for dwelling units, this implied warranty does not extend to the lease of a mobile home lot because a mobile home lot is a parcel of land, not a residence or a dwelling unit. They further argue that even if such a warranty did apply to mobile home lots, it would not apply here because plaintiffs waived any such warranty in their lease agreement.

The first issue presented, then, is whether Mississippi's warranty of habitability applies to the lease of a mobile home lot. Defendants submit that Justice Sullivan's reasoning in O'Cain, including his reference to the Residential Landlord and Tenant Act, reflects the court's intent that the implied warranty of habitability be limited to "residential lease agreements," that

is, those which provide for the lease of a "dwelling unit." Plaintiffs, on the other hand, submit that they did not merely lease a piece of land, but rather an improved lot intended for use solely for their residence, and that the same considerations which led the court to adopt the warranty of habitability for actual dwelling structures apply equally here.

As this is an issue of first impression for Mississippi, this court must resort to an Erie-guess as to how the Mississippi courts would rule on the issue. Having done so, the court concludes that the Mississippi Supreme Court would apply the implied warranty of habitability to mobile home lots.

The few courts that have considered the issue have found this implied warranty applicable to mobile home lots. This court has found no case holding otherwise. Notable among the cases extending the warranty in this manner is Staley v. Bouril, 553 Pa. 112, 718 A.2d 283, 285 (1998), one of the first cases to consider the issue. The court's reasoning for extending the warranty is sound. In deciding whether the implied warranty of habitability applied to the lease of improved lots in a mobile home park, the court in Staley recalled the reason it had abandoned the doctrine of *caveat emptor* and adopted the implied warranty of habitability in residential leases in the first place, i.e., "'in order to keep step with the realities of modern day leasing.'" Id. at 115-16,

718 A.2d at 284 (quoting Pugh v. Holmes, 486 Pa. 272, 405 A.2d 897 (1979)). The court wrote,

Pugh's primary rationale for adopting the implied warranty of habitability is that, "the modern tenant is not interested in land, but rather bargains for a dwelling house suitable for habitation." Id. at 282, 405 A.2d at 902. Pugh recognizes that, unlike tenants in feudal society to whom "any shelters or structures existing on the land were 'incidental' concerns, . . . the modern apartment dweller is a consumer of housing services." Id. at 280-82, 405 A.2d at 901-02 (citation omitted). Thus, "[t]he contemporary leasing of residences envisions one person (landlord) exchanging for periodic payments (rent) a bundle of goods and services, rights and obligations." Id. at 282, 405 A.2d at 902 (citation omitted). Such goods and services include "not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance." Id. (citation omitted).

Id. at 116, 718 A.2d at 284.⁴ The Staley court recognized that "in leasing improved lots in a mobile home park," tenants "bargain for a similar bundle of goods and services," including, for example, "potable water, adequate septic service, and proper electrical connections," all of which are "essential components of a habitable residence." Id., 718 A.2d at 284-85. The court also recognized that "landlords of mobile home parks, like other landlords, generally have far greater bargaining power than their tenants." Id., 718 A.2d at 285. On the other hand, the court

⁴ The court notes that the Pugh court was among the "progressive" courts to which Justice Sullivan alluded in O'Cain as having abandoned *caveat emptor* in favor of the implied warranty of habitability for residential leases.

acknowledged that unlike the typical residential lease, "which is intended primarily to convey an interest in a residence, and not the land that underlies it," the lease of a mobile home lot "is intended primarily to convey an interest in a plot of land, albeit with some improvements, and has nothing to do with the dwelling structure that sits on top of it." Id. at 116-17, 718 A.2d at 285. The court thus concluded that the lessee of a mobile home lot does not receive the same implied warranty of habitability that is present in the typical residential lease, but it does give rise to "a limited implied warranty of habitability, the scope of which depends on the particular circumstances of the case." Id., 718 A.2d at 285. The court stated that in applying the limited warranty of habitability,

a breach of the warranty occurs where there is a defect "of a nature and kind which will prevent the use of the [lot] for its intended purpose to provide premises fit for habitation. . . ." [Pugh, 486 Pa.] at 289, 405 A.2d at 905. "Materiality of the breach is a question of fact to be decided by the trier of fact on a case-by-case basis," and depends on such factors as "the existence of [regulatory] violations and the nature, seriousness and duration of the defect." Id. at 289, 405 A.2d at 905-06 (citation omitted).

Id., 718 A.2d at 285.

Other courts have found the implied warranty of habitability to apply mobile home lots on similar reasoning. See Renken v. Ludwig, No. 19615-1-III, 110 Wash. App. 1037, 2002 WL 244974, at *4-5 (Wash. Ct. App. Feb. 21, 2002) (finding that implied warranty of habitability applied to mobile home lot where lot was leased

"for the sole purpose of placing a manufactured home on it," and stating, "Leased home sites must be suitable for the purpose for which they are rented. No less than other tenants, mobile home park dwellers contract for a bundle of rights and services comprising a habitable space."); see also King v. Brace, 150 Vt. 222, 552 A.2d 398 (1988) (where state law recognized implied warranty in the rental of any residential dwelling obligating landlord to deliver and maintain premises that are safe, clean and fit for human habitation, court found breach of implied warranty of habitability where sewerage and water defects rendered mobile home lot unfit for residential purposes). Moreover, a number of state legislatures have also adopted habitability standards for mobile home parks. See, e.g., Sterling v. Stevens, 2003 WL 22232008, *2 (Ohio Ct. App. 2003) (observing that Ohio mobile home park operators have same statutory duty as residential landlords, namely, to "[m]ake all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition") (citing R.C. 3733.10(A)(2); R.C. 5321.04(A)(2)); Marple v. Papermill Park Corp., 1993 WL 945946, *4 (Va. Cir. Ct. 1993) (observing that Virginia's Mobile Home Lot Rental Act provides that various sections of the Virginia Landlord Tenant Act, including those which obligate the landlord to make repairs necessary to put and keep the premises in a fit and habitable condition and grant a right of action for damages for a person

adversely affect by a landlord's breach of duty, apply "to the rental and occupancy of mobile home lot") (citing Va. Code 55-248.13, 55-248-40, 55-248.48); Clarkson Mobile Home Park, Inc. v. Ecklund, 141 Misc. 2d 83, 532 N.Y.S.2d 615 (N.Y. Co. Ct. 1987) (observing that warranty of habitability originally recognized as applying to residential leases had been codified by legislature and co-extensive warranty of habitability extended to mobile home parks) (citing McKinney's Real Property Law § 233(e)).

This court is of the opinion that the Mississippi Supreme Court would find the reasoning of Staley and Renken persuasive and hold that those who rent mobile home lots for the purposes of residing thereon have the same general expectation with respect to the habitability of their lot as one who rents a dwelling, and that the lessor of such a lot is required to provide "a reasonably safe premises at the inception of the lease, and to exercise reasonable care to repair dangerous defective conditions upon notice of their existence by the tenant, unless expressly waived by the tenant." O'Cain, 603 So. 2d at 833.

Seizing on the "unless expressly waived" language of O'Cain, defendants argue that even if the law would recognize an implied warranty of habitability as applicable to mobile home lots, such a warranty is obviously subject to waiver. According to defendants, Justice Sullivan's concurring opinion in O'Cain and the provisions of the Residential Landlord Tenant Act stand for the proposition

that the duties of the landlord can be assumed by the tenant and thus waived; and they submit that this is precisely what occurred here. That is, defendants contend that plaintiffs' lease agreement clearly shifts the responsibility for the maintenance and repair of the subject lot to the plaintiffs; that plaintiffs, with full knowledge of the condition of the premises, freely and voluntarily entered into the lease agreement and agreed to abide by the park policies; and plaintiffs thereby relieved defendants of any duty with respect to the condition of the premises.

In response to defendants' argument on this point, plaintiffs insist that Justice Sullivan's statement regarding waiver obviously contemplated the possibility of waiver only with respect to a landlord's duty to maintain the premises *during* the term of the lease, but not with respect to the landlord's duty to provide a habitable premises *at the inception of the lease*. Plaintiffs argue that the latter is not subject to waiver, reasoning that the warranty would cease to exist altogether if landlords, who typically are in the better bargaining position, could relieve themselves of any duty to provide a habitable premises at the start of a leasehold simply by the expedient of a contractual provision shifting the burden to the tenant. While plaintiffs insist this cannot be the law, it seems to the court that it is. However, that does not mean that the lessee is entirely vulnerable in this regard.

Again, Justice Sullivan stated:

[T]he bare minimum standard for an implied warranty of habitability should require a landlord to provide reasonably safe premises at the inception of the lease, and to exercise reasonable care to repair dangerous defective conditions upon notice of their existence by the tenant, unless expressly waived by the tenant.

Id. at 833. Read alone, this passage is arguably ambiguous as to what can be waived. However, one of the cases cited by Justice Sullivan in support of this statement is particularly informative. Mansur v. Eubanks, 401 So. 2d 1328, 1329-30 (Fla. 1981), included similar waiver language, stating:

[T]he owner of a residential dwelling unit, who leases it to a tenant for residential purposes, has a duty to reasonably inspect the premises before allowing the tenant to take possession, and *to make the repairs necessary to transfer a reasonably safe dwelling unit to the tenant unless defects are waived by the tenant . . .* After the tenant takes possession, the landlord has a continuing duty to exercise reasonable care to repair dangerous defective conditions upon notice of their existence by the tenant, unless waived by the tenant.

It seems reasonably clear, therefore, that Justice Sullivan contemplated that a lessee could waive the lessor's "duty to make repairs necessary to transfer a reasonably safe dwelling unit to the tenant" at the inception of the lease. It does not follow from this that defendants are entitled to summary judgment. The fact that the warranty of habitability is subject to waiver does not mean that there was a waiver here. In the court's opinion, a question of fact does exist as to whether such a waiver occurred.

The standards and rules regarding proof of waiver assist the lessee. Waiver is the voluntary relinquishment of a known right. Wilson v. General Motors Acceptance Corp., 833 So. 2d 56, xx (Miss. 2004) ("Waiver is defined as 'an intentional relinquishment or abandonment of a known right or privilege.'") (quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461, 1466 (1938)). Moreover, the fact of waiver typically must be proved by clear and convincing evidence. See Swift v. Aberdeen Lumber Co., 172 Miss. 697, 159 So. 301, 305 (Miss. 1935). Furthermore, the Residential Landlord Tenant Act, which informed Justice Sullivan's concurrence in O'Cain, provides that "a landlord and tenant may agree in writing that the tenant perform some or all of the landlord's duties under this section, *but only if the transaction is entered into in good faith.*" Miss. Code Ann. § 89-8-23 (emphasis added).

Here, Mr. Moorman claims that a representative of defendants promised him that defendants would repair the broken sidewalk; he presumably believed this would be done, notwithstanding provisions in the lease agreement that would otherwise have obligated him to repair and maintain the premises. Assuming for present purposes that repair of the sidewalk would have been necessary to render the premises habitable,⁵ then if the jury were to accept Mr.

⁵ Another issue which will remain for jury resolution is whether the "busted up" sidewalk constituted to a violation of the warranty of habitability. The parties have presented no argument

Moorman's testimony, they would surely be justified in concluding that plaintiffs did not knowingly and voluntarily waive their right to have defendants repair the sidewalk, and would similarly be warranted in concluding that the transaction was not in good faith.

For the foregoing reasons, the court cannot conclude that summary judgment is appropriate. It is therefore ordered that defendants' motion for summary judgment is denied.

SO ORDERED this 6th day of September, 2006.

/s/ Tom S. Lee

UNITED STATES DISTRICT JUDGE

on this issue and little evidence, in fact, as to the exact condition of the sidewalk or the danger posed thereby. The court can envision a scenario in which the location and condition of a sidewalk was unreasonably dangerous so as to affect the habitability of the lot, and which could support a finding that the implied warranty of habitability has been breached. This, then, would be a legitimate issue for a jury. Cf. Krugh v. Laurich, 1991 WL 575857, *3 (Pa. Com. Pl.), 17 Pa. D. & C. 4th 666, 671 (Pa. Com. Pl. 1991) ("By way of example, allegations of an unstable rear wood deck, sidewalk subsidence, dangerously weak garage walls, use of untreated lumber in below grade construction, and defective window/door caulking could, if proven at trial to be of a sufficiently serious magnitude, be found to violate the warranty of habitability."); Joiner v. Haley, 777 So. 2d 50, 52 (Miss. Ct. App. 2000) (question "whether the existence of a second-floor door opening into thin air over a ground-level concrete patio was an unreasonably dangerous condition affecting the habitability of the premises" was legitimate jury question).